THE SUBSTITUTION OF RULE FOR DISCRETION IN PUBLIC LAW[1]

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The course of recent legislation for the regulation of commerce, trade and industry has created the impression that there exists a tendency in our law to transfer powers of determination from the courts which act according to fixed principles to administrative commissions or officials vested with large discretionary powers.

Considering that normally the progress of law should be away from discretion toward definite rule, such a tendency should receive the most careful examination. The first inquiry should however be whether and to what extent the impression is substantiated by facts.

The advent of the new administrative power is in the public mind associated chiefly with public utility and industrial commissions first created for the control of railroads, for the earlier powers over banks and insurance companies, as well as those of medical and other licensing boards, attracted relatively little attention or comment.

These commissions have indeed been vested with powers of a type hitherto withheld from administrative authorities under our system, powers which are not intended to serve as instruments of a fully expressed legislative will, but which are to aid the legislature in defining requirements that on the statute book appear merely as general principles.

While this undoubtedly constitutes in a sense a delegation of legislative power, it is not always equally certain that there is also a substitution of a wide administrative discretion for a fixed

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rule to be administered judicially. It is true that such a substitution takes place, where e.g., a definite legislative railroad rate is repealed in favor of a commission power to fix a rate required by statute merely to be reasonable.

But has it been as a matter of fact the course of the new legislative development to supersede specific by generic rules? Probably there are such cases, though I know of none in the field of railroad legislation. The evolution has rather been from generic legislation to administrative power to carry such legislation into effect by specific requirements.

How did that generic legislation operate? By leaving the question whether it had been complied with to a determination by a judicial proceeding. Reasonableness, safety, adequacy, etc., thus became issues in a civil or criminal action, and as mixed questions of law and fact they went to a jury under instructions by the court. Notwithstanding these instructions there remained a very considerable discretion with the jury. In criminal proceedings this was apt to operate in favor of the accused, because a jury will not lightly send a person to prison, but in civil cases for damages, especially against a corporation, the plaintiff was not unlikely to win a verdict from a liberally inclined jury.

In labor legislation therefore employees prefer a generic to a specific rule. It has been observed that under the present mining law of Illinois which contains very specific requirements, the chances of recovery are impaired by the result turning on the presence or absence of certain safeguards, while on a general issue of safety a jury might find a verdict in favor of the plaintiff. Obviously, the element of discretion allows the play of sympathy and is therefore desired by those counting on sympathy.

The result of the new administrative power, though likewise in a sense discretionary, is plainly the other way: it substitutes for the more or less arbitrary judicial action—arbitrary because delegated to a jury—a fixed and responsible rule.

The new development is therefore not such as is often assumed, but the very reverse.

The real significance of administrative ruling authority then does not lie in any diversion of genuine judicial power, but in relieving the judiciary from functions in their nature more or less legislative.

It will be asked: why, if the judicial enforcement of vaguely formulated requirements was not satisfactory, were statutes not made more specific? The answer is, that this has been done to a considerable extent, notably in the domain of labor legislation and of safety requirements, the mining and factory legislation of Illinois furnishing conspicuous illustrations in point.

In railroad legislation, however, which shares with liquor legislation the distinction of having furnished American constructive statutory policies their strongest opportunities and tests, a similar specialization whether in the matter of rates or service requirements, has proved impracticable, and it was therefore in this field that the delegation of quasi-legislative powers set in. It is much more recently that it has been advocated for other industrial legislation, as being calculated to secure greater flexibility and adaptability to circumstances, and the principle has had its most notable triumph in the minimum wage legislation of 1913, Utah alone having ventured upon a direct legislative schedule of rates. Most typical of the new legislative policy is however the Wisconsin industrial commission act of 1911 which simply requires employers "to furnish employment which shall be safe for the employees and to furnish places of employment which shall be safe for employees and frequenters, and to adopt and use methods and processes reasonably adequate to render places of employment safe."

If the main purpose of the new departure is to be greater flexibility, and by flexibility we are to understand not merely differentiation but variability of regulation, it can be endorsed only with great reservations. Differentiation can be secured by statute as well as by administrative ruling. Variability, on the other hand, is desirable only in very few phases of social or economic regulation, while industry needs above all permanence and continuity of policy and requirement. If the delegation of powers were to encourage impermanence and fluctuation, though in

pursuance of a progressive policy, the result might easily become intolerable.

It is probably needless to entertain undue apprehensions in that respect; the force of circumstances will impose upon commissions a proper degree of conservatism, and if inferences may be drawn from foreign experiences, it is worth noting that American statutes change more frequently than the regulations of the German Federal Council.

Weighing relative advantages, it may be expected that administrative action can be set more easily in motion than legislation, and that it can better plan a program of gradual development; that while administrative authorities have a better sense of what is practically enforceable, legislatures have a keener sense of what is politically expedient, that while the former can mix suasion with command, the latter can invest their commands with greater publicity and a higher moral authority. Administrative action will be preferred by those who believe in regulation, legislative action by those who consider regulation a necessary evil.

Administrative action has however the indisputable, though incidental advantage, that it permits the process of establishing rules to be surrounded by procedural guaranties and other inherent checks which will tend to produce a more impartial consideration than the legislature is apt to give, and which should in course of time, if not immediately, substitute principle for mere discretion. Such a result would mean an enormous step in advance for our entire system of public law, and it is therefore important to inquire whether we are justified in expecting it.

It is not of course contended that this result necessarily attends the vesting of discretionary power in administrative authorities. On the contrary the history of discretionary administrative power would seem rather discouraging. It is not necessary, in order to prove this, to refer to so conspicuous an instance of the arbitrary exercise of administrative discretion as the valuation of property for purposes of taxation, for the demoralization of administrative action is here plainly due to impracticable or mistaken legislative policies, and if public opinion insists upon a policy in legislation which it repudiates in administration, there will be an inevitable loosening of administrative standards.

It is fairer to test the operation of discretionary powers by such normal administrative functions as the appointment and removal of officers, or the grant of licenses. Unlimited and unregulated control of official tenure led to the prostitution of the civil service to the game of party politics, and the remedy is now sought in the enactment of civil service laws, the main purpose of which is to reduce or altogether eliminate discretionary power. In the matter of licenses, discretion has generally been qualified, and upon the basis of the qualifying restrictions the courts have on the whole been able to cope with gross abuses of discretion. There remained however enough of favoritism and corruption to lead the State of New York to abandon the system of discretion altogether in the matter of selling liquor, and in Germany all trade and business licenses are granted upon the basis of conditions which make administrative discretion judicially controllable.

Generally speaking, therefore, it would seem that discretionary administrative powers have not been signally successful. Nor is this surprising: for in a government by law discretion ought to have a very limited place in administration. Its legitimate function is indicated by the organization of a chief executive power which stands for that residuum of government otherwise subject to law which cannot be reduced to rule. Where discretion appears in inferior positions, it is either the confession of inability to discover a guiding principle, or the deliberate preference of personal influence to more objective considerations, i.e., the more or less unavowed manifestation of the shady and corrupt aspects of government.

It is a striking historic fact that the organization of English administration has had a strong judicial cast until the simplicity of that system broke down under the demand for more technical functions of administration. Judicial administration meant the exercise of discretion in forms which secured at least some of the benefits of rule and system.

Those processes to which rule could not be well applied—including the ascertainment of facts and values—the spirit of the English law was averse to entrust to the regular organs of the

administration, and they were consequently vested in the organs of self-government: jury, justices of the peace, and locally elected officers.

And in the like manner the function of government, which in a manner stood above and outside of the law: the variable element of policy, the constant readjustment of political life and of government to changing economic and social conditions—in other words, the function of legislation, was eventually withdrawn from the permanent organ of the state, the crown, and vested in the people's representatives.

The development of political institutions in America emphasized and strengthened what may be called the irresponsible elements in government. Much of the administrative business that in England had been in the hands of the justices of the peace and had been treated by them in a semi-judicial manner was transferred to purely administrative authorities, and these were placed upon a self-governmental, non-professional basis. The power of the jury, the least responsible of all the factors of government, was enlarged at the expense of the judiciary, the one stronghold of professionalism, and in allowing juries to determine sentences in criminal cases, the most incisive exercise of governmental power was made the type of the most arbitrary discretion. The functions of the legislature were increased by adding to the determination of policies and the control of finance, the chartering of corporations and the initiation of public works and improvements. And the legislatures gained an independence of executive guidance and initiative such as no other legislative bodies have ever had.

We get this peculiar vicious circle in the relation between discretion and self-governmental organs: a function which is exempt from rule because no applicable rule is known or none is desired —in itself a symptom of some governmental anomaly or imperfection—is committed to authorities which are closest to the people, elected, non-professional, holding by a brief tenure; and being in the hands of such authorities, the function is bound to retain the arbitrary type of discretion, for self-governmental organs lack the inherent checks which in professional organs evolve

principle out of constantly recurrent action. This is certainly borne out by American experience.

If we examine the history of our administration, there has never been any ascertainable standard in the selection or removal of officials until the advent of civil service commissions. There is no more important function than the grant, refusal or revocation of liquor licenses: is it possible to point to any American jurisdiction in which the administrative practice in this matter has been reduced to a recognized system? In Massachusetts there is a statutory power to revoke amusement licenses at pleasure; such a power is intolerable if not exercised in accordance with known rules, but no rule has been laid down in print and probably none exists.

Legislation is equally poor in self-imposed norms. The nature of legislative action, dealing as it does with constantly new problems by new and untried remedies, naturally demands greater freedom of movement. Conceding this there remains much even in the business of legislation that is reducible to principle. The spirit of the equal protection of the law demands a firm adherence to uniform intelligible criteria of discrimination; requirements of health and safety should be standardized, and in economic adjustments there should at least be a submission to the generally accepted truths of political economy.

It is not of course meant to imply that all legislation falls short of these standards, but merely that there is not the slightest assurance of uniformity of standards, and that the absence of rule inevitably results in an excessive proportion of inferior and defective measures. The condition may be assumed to be notorious; were it necessary to substantiate the charge, it would be sufficient to point to the bulk of our legislation. The combined collection of statutes for Prussia and Germany for 1911–1912 covers 483 pages, the English statute book (for the entire United Kingdom) for 1911 458 pages, for 1912, 146 pages. The acts of the sixty-second Congress from December 1911 to March 1913, are contained in two volumes of large size, the public acts alone covering 1026 pages, and the private acts 423 pages in addition. The Session Laws of New York for 1911 cover 2751 pages, for

1912, 1377 pages, for 1913, 2220 pages. It is probably true that Congress and New York represent the worst type of American legislation; Illinois makes a much better appearance; but every student of legislation is painfully aware of the mass of crude and ill-digested matter that annually or biennially emanates from our legislative halls.

It is particularly instructive to compare special legislation in America with special legislation in England. Parliament being controlled by powerful traditions curbing discretion, evolved methods of procedure in passing private acts which invested the enactment with the uniformity of judicial procedure. Thus divorces were granted only on strictly limited grounds, and the method of procuring them was rigidly prescribed and never departed from. In America the same matter was sometimes treated as a joke, as where an act of Missouri granted a divorce because the parties could not live happily together and "because the happiness of the people should be the ultimate aim and object of all governments." So much of special legislation went by favor or corruption that in many States it was deemed wisest to suppress it entirely by constitutional prohibition.

If in Europe legislation is a more orderly and systematic matter than in America, if it is possible to discern in the diversity of legislative policies a steadfast adherence to controlling principles at least in the technical and objective phases of statute law, this is due chiefly to the initiation of nearly all important measures by the organs of the executive government. Even with the greatest freedom of parliamentary amendment legislation retains the character given to it by its introducers. Executive preparation impresses upon it such unity of tradition and purpose as the government itself possesses, and the necessity of defending measures in the face of parliamentary criticism compels the government to fortify itself at least with the show and semblance of principle.

It is noteworthy that after a thorough inquiry into a department of legislation in which the absence of rule and system has been particularly prejudicial to public interests, viz., the appropriation and expenditure of public moneys, a recent presidential

commission urged the preparation of systematic estimates by the executive as the only adequate means of standardizing public finance. The suggestion met with no favor on the part of Congress. It is of course difficult to convince Congress that it has not only fundamentally mismanaged a business to which the greater portion of its labors has been directed, but that by the nature of its constitution it is incapable of effecting a reform without outside aid.

But it is not beyond the range of possibility that public opinion will insist upon the executive assuming a controlling share of legislative initiative, and if so we might well expect a duplication of European conditions.

It will be asked: have we not a body of constitutional law to provide us with principles of legislation? The answer must be rather negative.

Insofar as judicial control over legislation is exercised on the basis of fundamental guaranties, it enforces a minimum and not a maximum of reasonableness of legislation, and is therefore no substitute for the principle producing factors in the European systems; on the contrary, the judicial point of view is liable to impress itself upon legislators to the extent of inducing the belief that constitutionality is an adequate standard of principle and justice.

If constitutional law looms large in our estimation it is on account of its practical importance in litigation. Being an essential tool to lawyers, it has given rise to an enormous literature. The very much more fruitful principles of legislation evolved in the government departments of Germany, France, and Great Britain on the other hand cannot become the subject of forensic discussion, and have remained a bureaucratic tradition, unarticulated and unformulated in systematic exposition, and they are generally regarded as lying outside of the domain of legal science.

Nor should we expect the evergrowing bulk of our written constitutions to yield an adequate supply of principles of legislation. Not as if the governmental experience of the nineteenth century had not been crystallized into some limitations of the utmost

value; but let any one study the trend of our written constitutions, and he will be surprised to find to what slight extent our constitutional conventions have been principle producing agencies. The constitution-making democracy concerns itself very little with the quality of legislation.

It would also be unwarranted to treat the present tendency to delegate the specification of generic legislative requirements to administrative commissions as a beginning of a revolution in our legislative practice; for it is only within very narrow and definite limits that the practice is constitutionally desirable and legitimate.

So far as it goes however, it will furnish a capital object lesson of the development of rules for legislative action. It is obviously the legislative intent that administrative action in the exercise of delegated powers of subordinate legislation shall be of a superior type, that it shall be quasi-judicial, and—in some cases—subject to judicial review.

We have come to associate a due recognition of permanent principles with the administration of justice and its methods of procedure tending to emphasize the impartial and objective point of view. The judiciary has however by no means a monopoly in this regard. Similar results are likely to attend other official action, provided that it be sufficiently detached from the strife of interest and imbued with a sense of professionalism. It shares with judicial action the respect of precedent and the respect of expert opinion, habits of mind which distinguish both from the irresponsible action of popular bodies.

So far as can be judged from the practice hitherto pursued by the Interstate Commerce Commission, by state public utility and industrial commissions, civil service commissions, and accident boards, the main conditions will be observed which are apt to produce a body of principles for the framing of rules. Even the absence or scarcity of statutory direction for the exercise of the rule-making power may be condoned if it means that the legislature believes that wiser observances will assert themselves by the gradual operation of judicial procedure and of precedent. It will remain to be seen whether ultimately it will not be necessary to

give to these directions a statutory form. The next ten or twenty years may be expected to teach us a good deal with regard to this matter.

Though the movement is yet in its beginning, we have already rule-making administrative bodies dealing with such diverse matters as fixing of rates, valuing property, standardizing efficiency and compensation in public service, prescribing health and safety requirements, fixing tests of disability, and advising or prescribing wage schedules.

Probably all these matters are not in an equal degree amenable to rule and principle. Not all government can be standardized. In the ordering of public as of private affairs, there is a legitimate place for wisdom and judgment, and even, where there are hidden or imperfectly understood forces and agencies, for speculation and chance.

Even in these matters there may be a limited opportunity for applying principle. Though it be impossible scientifically to determine standards of service or of compensation, it may be possible to estimate certain considerations at their true value and give them effect accordingly. Public undertakings will probably always remain matters of discretion, but their financing can well become matter of rule. And so all along the line. Not the least valuable effect of a wise delegation of power will be that it may enable us in the light of experience to judge better the respective provinces of rule and discretion, and organize public action accordingly.